PP

v.

KARIM AB JAABAR

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CRIMINAL TRIAL NO: 45-7-1998]
13 MARCH 2002

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Presence of dangerous drugs in car driven by accused - Whether sufficient to constitute physical possession - Section 37(da) - Presumption of trafficking - Whether may be invoked based on presumption of possession under s. 37(d)*

EVIDENCE: *Adverse inference - Failure to call material witnesses - Attempt to tender witness's statement under s. 32 Evidence Act 1950 - Whether admissible - Evidence Act 1950, ss. 32, 114(g)*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 37(j) - Analysis of dangerous drug - Failure by chemist to comply with s. 37(j) - Whether accused ought to be acquitted*

The accused was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in cannabis which was punishable with death under s. 39B(2) of the Act. The police arrested the accused after an ambush in which they discovered a red plastic package in the front passenger seat of the car that he was driving, and another plastic package in the booth of the car, both containing what was suspected to be ganja.

Held:

[1] Other than the fact that the accused was in control of the said motorcar in which the ganja was found, the prosecution led no direct evidence of physical possession as required in criminal law. There was no evidence that the accused, who clearly did not own the car, was consciously aware that the wrapped package in the front passenger seat and the other wrapped package in the booth of the car contained ganja. (pp 195 d-e & 196 b-d)

[2] Even assuming that by merely having custody or being in control of the said motorcar could raise the presumption of possession under s. 37(d) of the Act against the accused, the prosecution had to further rely on s. 37(da) of the Act in order for the presumption of trafficking to arise. However, the decision in *Muhammed Hassan v. PP* clearly stated that the

prosecution cannot rely on a double presumption to prove its case for trafficking; on this ground, the case for the prosecution must fail. (p 196 g-h)

[3] Section 114(g) of the Evidence Act 1950 was invoked against the prosecution for its failure to subpoena two important witnesses who were missing links in its chain of witnesses. (p 198 a-c)

[4] The prosecution's attempt to tender a witness's statement recorded by the police under s. 32 of the Evidence Act 1950 was inadmissible as the prosecution had failed to satisfy the condition precedent under the said section which was to show that the said witness could not be procured without an amount of delay or expense. (p 198 e-h)

[5] The chemist testified that he never complied with s. 37(j) of the Act in the course of his analysis of the drugs, which was to analyse samples of the contents amounting to not less than 10% of the amount for the presumption under s. 37(j) to arise; this would entitle the accused to an acquittal. (p 199 e-f)

[6] At the close of the case for the prosecution, the prosecution had failed to make out a charge under s. 39B(1)(a) and punishable under s. 39B(2) of the Act. Therefore, the accused was acquitted and discharged without his defence being called. (p 199 g)

[Ordered accordingly.]

Case(s) referred to:
Chan Pan Leon v. PP [1956] 22 MLJ 237 ***(foll)***
Khoo Hi Chiang v. PP & Another Case [1994] 2 CLJ 151 ***(foll)***
Loo Kia Ming v. PP [2000] 3 CLJ 653 ***(foll)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 ***(foll)***
PP v. Lim Lian Chen [1992] 1 AMR 253 ***(refd)***
Sim Tiew Bee v. PP [1973] 2 MLJ 200 ***(foll)***
Ti Chuee Hang v. PP [1995] 3 CLJ 1 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), (da), (h), (j), 39B(1)(a), (2)
Evidence Act 1950, ss. 32, 114(g)

For the prosecution - Adnan Aziz DPP
For the accused - M Athimulan; M/s M Athimulan & Co

Reported by Suresh Nathan

JUDGMENT

RK Nathan J:

The Charge

The accused was charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 for trafficking in 10,384 grammes of cannabis and punishable with death under s. 39B(2) of the same Act. The offence was alleged to have been committed on 22 April 1997 at about 7.25pm near the Edaran Automobil National (EON), Bulat Dumbar, Lengkok Dumbar in the district of Laut Timor, Pulau Pinang.

History Of The Case

This case initially commenced before Wan Adnan J on 7 December 1999 who heard the evidence of the Police Photographer (SP1) and the Chemist (SP2). The evidence of the Raiding Officer (SP3) was only part-heard when the learned judge was transferred. Hasan Lah J was then set to hear this case but he too went on a transfer. Tee Ah Sing J then took over the matter and ordered the case to commence *de novo*. Tee Ah Sing J was then transferred to court 2 and when I took over this case, parties by consent asked me not to hear the matter *de novo* but to accept the evidence of SP1 and SP2 and to start afresh with the evidence of SP3. The reasons given were that the Chemist's evidence was lengthy and protracted and had taken many days with 35 exhibits having already been tendered. If this court was to hear the evidence *de novo* an order would have to be made to return the exhibits and then to re-tender the same all over again. A further consideration was the fact that the accused had been on remand since the date of his arrest on 22 April 1997. Counsel for the accused also pleaded that this was an assigned case. Having considered all these issues I agreed not to hear the case *de novo* but to start afresh with the evidence of the raiding officer and that I would rely on the evidence recorded previously in respect of the evidence of SP1 and SP2.

Facts

The evidence of SP3 superintendent Ramli bin Din was that he headed a raiding party that arrested the accused after an ambush. He denied a suggestion that the accused had alighted from the car he was driving when he was arrested. The next witness Insp Raja Hafiz (SP4) testified that he led a team of policemen who laid an ambush at a bus stop at Bukit Dumbar. The three other teams were led by Sup Ramli (SP3), ASP Rahman and ASP Teoh Paik Leng. Altogether there were eleven of them in the raiding party. There were five in his team and they were on three motorcycles. At about 7.25pm the accused driving a BMW bearing registration no. PDJ 31 drove up and stopped at the bus stop. Insp Raja Hafiz then informed ASP Ramli of this through his walkie-talkie. He was asked to follow the accused. The accused then drove

towards EON along Bukit Dumbar and stopped by the roadside. At that moment, the other two motorcycles blocked the accused from the front and from the rear, whilst Insp. Hafiz rode-up to the driver's side. He then identified himself as a police officer. During the arrest a scuffle ensued and the accused was slightly injured. By then Supt Ramli had joined them and discovered in the front passenger seat a red plastic package containing what was suspected to be ganja. On examining the booth of the car they discovered another plastic package also containing similar substance. Supt Ramli then arrested the accused and drove the said car to the police station where subsequently he made a police report. When ASP Wan Abdul Rashid the initial investigating officer of the case retired, SP5, Chief Insp Sivarajah took over as the investigating officer. Whilst he was not involved in the investigations proper, he took possession of the drugs involved in this case from the chemist after it was sent for analysis. The sixth witness was the records officer from the Jabatan Pengangkutan, Pulau Pinang. From the records in his possession he testified that the last registered owner of motorcar PDJ 31 was one Teoh Boey Eng. The seventh witness for the prosecution was ASP Teoh. He was called merely to show he had custody of the car in question until produced in court. The next witness called by the prosecution (SP8) was one Hamidah Clara bte Abdullah, the wife of one Ismail bin KS Majid, a second-hand dealer, who last owned the car in question. She testified that she had not seen her husband drive PDJ 31 at all. He was merely asked to sell the said car. When asked where her husband was, she said that she didn't know where he was as he had joined a 'kumpulan ulama' a year ago and was moving from place to place and he did not even contact her by phone. The last she saw her husband was about three weeks before she testified. She was unable to tell when he would come home next. The ninth witness was L/Cpl Mohd Sazali He testified that he was instructed to serve a subpoena on Ismail bin KS Majid to testify in this case. He went to a shop called Ismail Nasi Kandar at Jalan Macalister, Pulau Pinang which was owned by the said witness. There he was informed by the caretaker of the shop that Ismail bin KS Majid owned Ismail Nasi Kandar but at that moment he was in Ipoh on business. However, the caretaker was unable to tell the witness when the said Ismail would return to Penang. The tenth witness for the prosecution was Cpl Mat Halim. He was instructed to look for one Teoh Boey Eng, the last registered owner of the BMW in question, PDJ 31. His evidence was that from his investigation the address as stated, belonged to a flat and not to the house of the said owner. The prosecution then recalled the subsequent investigating officer Chief Insp Selvarajah (SP5). He confirmed that he had recorded a statement under s. 112 of the Criminal Procedure Code from the said Ismail bin KS Majid. The prosecution tendered the said report because of its inability to have subpoenaed Ismail bin KS Majid to testify. Counsel for the accused reserved the right to submit both on the admissibility of the said statement and its weight. The last

witness for the prosection was former ASP Wan Abdul Majid (SP11), the initial investigating officer of the case. He confirmed that ASP Ramli handed over to him the accused and the drugs seized from the said motorcar, together with the exhibits which he listed out. He then weighed the ganja seized. He then marked the relevant exhibits and stored them in his room which he locked and to which room, only he had access. Subsequently he handed the drugs to the chemist for analysis. From his investigations he ascertained that the accused was a used car salesman. It was then time for him to retire and Chief Insp Selvarajah took over the investigations from him. With this the prosecution closed its case and offered the rest of the witnesses to the defence.

Findings Of The Court

Trafficking is defined in s. 2 of the Act. It reads:

> "trafficking" includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug;

The prosecution had to prove either by direct evidence the possession of the drugs by the accused, or through the presumptive s. 37(d) and (da) of the said Act. Other than the fact that the accused was in control of the said motorcar in which the ganja was found the prosection led no direct evidence of physical possession as required in criminal law. There is, in my view, no better case to illustrate this principle than the case of *Chan Pan Leon v. PP* [1956] 22 MLJ 237 wherein Thomson J (as he then was) said at p. 239:

> In my experience there is no question which Magistrates find more difficult to deal with than this question of what amounts to "possession" for the purposes of the criminal law. Much of this difficulty arises from a failure to appreciate that in reality there are two separate questions involved. The first is whether the accused party was in possession of the article in question and the second by reason of the application of the maxim *actus non facit reum nisi mens sit rea* is whether he had knowledge of the nature of the thing possessed.
>
> "Possession" itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Edition), page 304):
>
> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him,

> for example have it in his pocket or have it lying in front of him on a table. It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*.

Whilst the accused was at the steering wheel of the car clearly he was not the owner of the car. The prosecution failed in its attempt to trace the last registered owner of the car. Even assuming that the said car was left with Ismail bin KS Majid to be sold as a second-hand car, when did the said Ismail take possession of the said car. Although the initial investigating officer testified that from his investigations he had ascertained that the accused was also a car salesman with Ismail bin KS Majid because he had tendered to court the business card of both the accused and Ismail as being with the said second-hand car dealers, it is always possible for the accused to have used the car that day whilst it was with the dealers. There is no evidence that the accused was consciously aware that the wrapped package in the front passenger seat and the other wrapped package in the booth of the car contained ganja. In the circumstances it is now appropriate to see if the prosecution had succeeded in relying on the presumptive section.

Section 37(d) reads as follows:

> Any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

Subsection (da) of the Act reads as follows:

> Any person who is found in possession of ... 200 grammes or more in weight of cannabis, ... shall be presumed, until the contrary is proved, to be trafficking in the said drug.

Even assuming that merely by having custody or being in control of the said motorcar the presumption under s. 37(d) could arise against the accused, the prosecution has to further rely on sub-s. (da) to show that the amount of ganja in the two packages exceeded the set 200 grammes in order for the second presumption to arise. But the decision of the Federal Court in *Muhammed Hassan v. PP* [1998] 2 CLJ 170 and as applied by the Court of Appeal in *Loo Kia Ming v. PP* [2000] 3 CLJ 653 CA states clearly that the prosecution cannot rely on double presumption to prove its case of trafficking. On this ground the case for the prosecution must fail.

Further it has been held that a vehicle does not fall within the meaning of trafficking in the presumptive s. 37(d) of the Act. (See *PP v. Lim Lian Chen* [1992] 1 AMR 253 FC).

Since the drugs were not found concealed in any specially constructed compartment of the car, the presumption arising out of s. 37(h) cannot apply in this case. Section 37(h) reads as follows:

> If any dangerous drug is found concealed in any compartment, specially constructed for the purpose, on any vehicle, it shall until the contrary is proved be deemed to have been so concealed with the knowledge of the owner of the vehicle and of the person in charge of the vehicle for the time being.

Since there is no direct evidence to link the accused to the drugs and since the presumptions cannot help, could the prosecution rely on circumstantial evidence to prove that the accused had in his custody or under his control all the said offending exhibits. If that is to be the case, then the Federal Court in *PP v. Lim Lian Chen (supra)* has held that the onus upon the prosecution in such a situation is therefore a very heavy one and the evidence must point irresistibly to the guilt of the accused. With this principle well settled, it is necessary to look at the facts of this case. Whilst it is true that the accused was driving the vehicle in question at the material time, he is not the owner of the car since the prosecution itself led evidence that the last registered owner of the vehicle was one Teoh Boey Eng who could not be traced. The wife of KS Abdul Majid testified that her husband had bought the car to be sold as a second-hand vehicle. Presumably, as seems to be the practice of second-hand car dealers, of which the said KS Abdul Majid was one, they do not transfer the cars to their names but do a direct transfer from the last owner to the new owner, thus avoiding paying the transfer fees. Since evidence was led that the accused was also working with KS Abdul Majid the accused could have merely used the car without knowledge of the contents of the packages in the car. In fact there is no evidence as to how long the accused had been in charge of the said motorcar and in *PP v. Lim Lian Chen (supra)* this was one of the factors the Federal Court considered. Therefore, clearly there can be no inference that he had any custody or control of the said drugs since he could not have had knowledge of the drugs wrapped in the packages. I was satisfied that the prosecution had failed to adduce any evidence that the accused had custody or control of the said drugs merely because the accused was driving the said car at the material time.

In *PP v. Lim Lian Chen (supra)* the Federal Court also considered and held against the prosecution for its failure to dust for fingerprints and for its failure to examine the accused's hands or fingernail clippings for traces of heroin. I was urged by the defence to consider similarly in this case, the failure of the prosecution to dust for the accused's fingerprints on the two packages and for its failure to examine the accused's hands or fingernail clippings for traces of ganja. I accept this submission of the defence on these issues since these would in my view be the best evidence available in view of the fact that the accused

was not the owner of the said motorcar. Clearly Teoh Boey Eng, the first registered owner and KS Abdul Majid are important witnesses who are missing links in the prosecution's chain of witnesses and they had not even been subpoenaed. In *Ti Chuee Hang v. PP* [1995] 3 CLJ 1 the then Supreme Court held that whilst the prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it also has the duty to call all necessary witnesses essential to the unfolding of the narrative of the prosecution's case to establish proof against the accused beyond all reasonable doubt. The Supreme Court went on to hold that at the very least, the prosecution should make them available for cross-examination by the defence and that if the prosecution failed to fulfil this duty, the accused must be acquitted. Guided as I am by this decision I am constrained to invoke s. 114(g) of the Evidence Act 1950 against the prosecution and on this ground too find for the accused. The feeble and lackadaisical approach taken to attempt to serve the subpoenas on Teoh Boey Eng and on Ismail KS Abdul Majid at the last moment of the trial, cannot shore-up the prosecution's case by satisfying the court that it had indeed made attempts. The attempts made were totally unsatisfactory and lacked seriousness.

At this point it is necessary for the court to consider the attempt made by the prosecution to tender Ismail KS Abdul Majid's statement recorded by the police, under s. 32 of the Evidence Act 1950. In *Sim Tiew Bee v. PP* [1973] 2 MLJ 200 the Federal Court had held that before a court could admit a statement of a witness as evidence under s. 32 of the Evidence Act 1950, the condition precedent contemplated under the said section must first be satisfied. In the case before me the condition precedent that the prosecution ought to have satisfied the court was either to show that the said witness Ismail KS Abdul Majid, could not be procured without an amount of delay or expense. In this case the witness' wife testified that her husband left the home about three weeks earlier. There is no evidence that he had absconded or had deserted his wife. Surely, the prosecution, knowing that the case had been fixed for hearing months ahead, could have served the subpoena. However, L/Cpl Mohd Sazali (SP5) who was instructed to serve the subpoena on the witness, met up with the caretaker of the witness' shop who told him the witness had gone to Ipoh. I am satisfied that no diligent search and reasonable effort or enterprise had been made to trace this witness and I cannot come to a conclusion that the prosecution had satisfied the court of the pre-requisite, before s. 32 can be invoked to admit the statement. I therefore reject the statement tendered under s. 32 as inadmissible on the basis that the witness is traceable as he had both a fixed abode, and a 'nasi kanda' shop.

In *Khoo Hi Chiang v. PP & Another Case* [1994] 2 CLJ 151 the then Supreme Court held that since the chemist had to identify by a series of tests the nature of the drug and this being a question of fact to be proved like any other conclusion of fact, either by direct or circumstantial evidence, it is obvious therefore that the evidence of the chemist on the identity and weight of the drugs constitute evidence of fact and not of opinion.

In fact SP2, the chemist, admitted under cross-examination that the evidence he was giving was factual. In the circumstances it is imperative for the prosecution to prove compliance with s. 37(j) of the Act which reads as follows:

> (j) when any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten per centum of such receptacles and if such analysis establishes that such samples are all of the same nature and description, it shall be presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and description as the samples so analysed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, that the contents of all the receptacles consist of or contain the same proportion of such drug.

SP2 testified that he never complied with s. 37(j) in the course of his analysis of the drugs. (Saya setuju saya tidak guna pastian anggapan di bawah peruntukan s. 37(j) ADB.) In other words here is an important witness, whose duty it is to satisfy the court that he had analysed samples of the contents amounting to not less than 10% of the amount for the presumption to arise, admitting to his abject failure to comply with such a mandatory requirement. On the chemist's evidence too, the accused ought to be entitled to an acquittal.

At the close of the case for the prosecution and after hearing the submissions of both parties, I held that the prosecution had failed to make out a charge under s. 39B(1)(a) and punishable under s. 39B(2) of the Dangerous Drugs Act 1952. I therefore acquitted and discharged the accused without calling for his defence. I ordered the exhibits to be retained by the police pending the disposal of the appeal and further ordered that a proper enquiry be held for the disposal of the said motorcar PDJ 31.